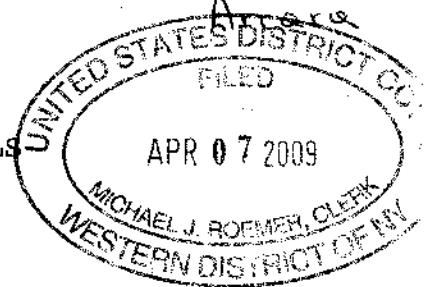


MANDATE

07-5718-cr
United States v. Bossinger1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED
 5 AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND
 6 FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT
 7 CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION
 8 MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)."
 9 UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE
 10 WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://WWW.CA2.USCOURTS.GOV)), THE
 11 PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER
 12 WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE
 13 AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT
 14 DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

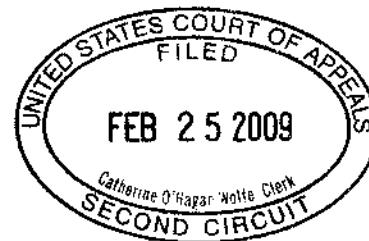
15 At a stated term of the United States Court of Appeals for the
 16 Second Circuit, held at the Daniel Patrick Moynihan United States
 17 Courthouse, 500 Pearl Street, in the City of New York, on the
 18 25th day of February, two thousand nine.

19 PRESENT:

20 HON. ROBERT D. SACK,
 21 HON. BARRINGTON D. PARKER,

22 Circuit Judges,

23 HON. TIMOTHY C. STANCEU,*

24 Judge.25 -----
 26 UNITED STATES OF AMERICA,27 Appellee,

28 - v. - No. 07-5718-cr

29 KELLY A. BOSSINGER,

30 Defendant-Appellant.

31 -----

* The Honorable Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

ISSUED AS MANDATE:

March 24, 2009

Appearing for Appellant: David M. Samel, Law Office of David M. Samel, New York, NY

Appearing for Appellee: Stephan J. Baczynski, Assistant
United States Attorney, for
Terrance P. Flynn, United States
Attorney for the Western District
of New York, Buffalo, NY

Appeal from a judgment of the United States District Court for the Western District of New York (Richard J. Arcara, Chief Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND
DECREED that the judgment of the district court be, and it hereby
is, AFFIRMED.

The defendant, a former United States Customs and Border Protection Officer, appeals from a judgment of conviction by the United States District Court for the Western District of New York. A jury found the defendant guilty of intentionally accessing a federal government computer in excess of her authorization, in violation of 18 U.S.C. § 1030(a)(2)(B); making false statements to federal investigators about the matter, in violation of 18 U.S.C. § 1001; and conspiracy to make false statements, in violation of 18 U.S.C. § 371. We assume the parties and counsel are familiar with the facts and procedural history of the case, and the issues presented on appeal.

The defendant makes three challenges to her conviction. We think each is without merit, but the third warrants a word of caution.

First, the defendant argues that the evidence was insufficient to convict her on any of the three counts. We review the question de novo. See United States v. Naiman, 211 F.3d 40, 46 (2d Cir. 2000). "On a sufficiency challenge, 'we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility.'" United States v. Parkes, 497 F.3d 220, 225 (2d Cir. 2007), cert. denied, 128 S. Ct. 1320 (2008) (quoting United States v. Arena, 180 F.3d 380, 391 (2d Cir. 1999)). We must sustain the verdict when "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in Jackson).

1 We conclude that the evidence was sufficient to convict the
 2 defendant on the computer crime count. The government was
 3 required to prove that she "intentionally access[ed] a computer
 4 without authorization or exceed[ed] authorized access, and
 5 thereby obtain[ed] . . . (B) information from any department or
 6 agency of the United States." 18 U.S.C. § 1030(a)(2). The
 7 defendant concedes that she accessed TECS in excess of her
 8 authorization to do so but argues that testimony that she "ran" a
 9 valid license plate number to test the system's automatic e-mail
 10 notification process does not establish that she "actually
 11 obtained information" from running the test. But a rational jury
 12 could have found beyond a reasonable doubt, if it credited
 13 Crooks's testimony, that the defendant's "test" provided her with
 14 information from a government agency. This is all the government
 15 was required to prove in that regard. See 18 U.S.C. §
 16 1030(a)(2).

17 The defendant argues that this reasoning improperly
 18 collapses the crime's "access" element with its supposedly
 19 separate mandate that the crime result in the defendant obtaining
 20 information. But "obtaining information" is not an element of
 21 the crime; "obtaining . . . information from any department or
 22 agency of the United States" is. 18 U.S.C. § 1030(a)(2)(B).
 23 There is no dispute in this case that the information Bossinger
 24 accessed was information from an agency of the United States.

25 The defendant's challenges to her convictions on the two
 26 other counts also fail. The evidence was sufficient to allow a
 27 rational jury to find, beyond a reasonable doubt, that Bossinger
 28 falsely denied accessing TECS to test the e-mail notification
 29 system and that Crooks and Bossinger conspired to lie to
 30 investigators. The defendant's challenges to her co-
 31 conspirator's credibility are without merit, because we must
 32 defer to the jury's assessment in that regard. See Parkes, 497
 33 F.3d at 225. The defendant's argument that "whether [she]
 34 admitted or denied" the true reason for her accessing the system
 35 "was of no consequence to the investigators" is an unsuccessful
 36 attempt to challenge the materiality of her statement. Securing
 37 a confession is of paramount consequence to investigators, not
 38 least because it would have saved the time and expense of this
 39 prosecution and appeal. Moreover, to be material a statement
 40 need only have "a natural tendency to influence . . . the
 41 decision of the decision-making body to which it is addressed,"
 42 United States v. Gaudin, 515 U.S. 506, 509 (1995) (quotation
 43 marks omitted), it need not actually exert such influence.

44 Second, the defendant challenges the admissibility of
 45 certain evidence. "We review a trial court's evidentiary rulings

1 deferentially, and we will reverse only for abuse of discretion.
 2 To find such abuse, we must conclude that the challenged
 3 evidentiary rulings were arbitrary and irrational." United
 4 States v. Quinones, 511 F.3d 289, 307-08 (2d Cir. 2007) (citation
 5 and internal quotation marks omitted). We have no cause to reach
 6 that conclusion here. An investigator's testimony that he
 7 disbelieved the defendant's explanation for accessing the TECS
 8 system was admissible to prove materiality. And evidence of the
 9 defendant's participation in an uncharged conspiracy to access
 10 the same system was relevant to undercut the defense theory that
 11 she played no culpable role in the charged conspiracy.

12 Third, the defendant argues that the prosecutor committed
 13 misconduct in summation. We think this point has some merit, for
 14 the prosecutor did a breathtaking variety of things we have
 15 repeatedly cautioned the government to avoid.

16 For example, the prosecutor improperly characterized aspects
 17 of the defense case using derogatory terms, including "sl[e]ight
 18 of hand," "spin[ning] a story," "complete okey-doke," a "bit of
 19 drivel," "simply outlandish nonsense," "a bill of goods," "hiding
 20 the ball," and "just throw[ing] stuff up in the air and hop[ing]
 21 something sticks." See, e.g., United States v. Resto, 824 F.2d
 22 210, 212 (2d Cir. 1987) (stating that references to defense
 23 tactics as "slick bits," "slyness" or "sleight-of-hand" were
 24 improper and warranted reprimand); United States v. Biasucci, 786
 25 F.2d 504, 514 (2d Cir. 1986) (stating that characterization of
 26 defense questions as "nonsense" was "improper and ha[s] no place
 27 in any court"), cert. denied, 479 U.S. 827 (1986); cf. United
 28 States v. Salameh, 152 F.3d 88, 138-39 (2d Cir. 1998) (finding no
 29 prejudice in prosecutor's use of "bill of goods" to refer to
 30 defense argument when made in rebuttal), cert. denied, 525 U.S.
 31 1112 (1999).

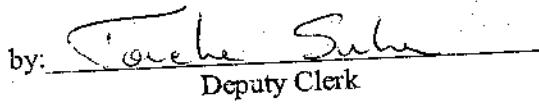
32 The prosecutor also improperly referred to the defendant's
 33 statements as "lies" more than 30 times in the course of a 24
 34 page summation transcript, see United States v. Peterson, 808
 35 F.2d 969, 977 (2d Cir. 1987) (finding improper the excessive or
 36 inflammatory use of "lie" to characterize disputed testimony);
 37 cf. Floyd v. Meachum, 907 F.2d 347, 354-55 (2d Cir. 1990)
 38 (stating that use of "the terms 'liar' or 'lie' over 40 times in
 39 characterizing [a defendant], who did not testify" was "clearly
 40 excessive and inflammatory"), used sarcasm as a rhetorical device
 41 to attack the credibility of the defendant, cf. United States v.
 42 Burns, 104 F.3d 529, 537 (2d Cir. 1997), and misstated two pieces
 43 of evidence. The government concedes only the last point was
 44 error.

1 Defense counsel failed to object to anything but the
2 derogatory comments. That makes the argument for reversal
3 difficult, because, while we review the comments about the
4 defense case to evaluate the severity of the misconduct, the
5 measures adopted to cure it, and the certainty of conviction
6 without it, we review the remainder of the misconduct only for
7 "flagrant abuse" causing substantial prejudice. Salameh, 152
8 F.3d at 134.

9 We think the repeated derogatory comments, while
10 inappropriate, did not suffice to deprive the defendant of a fair
11 trial. And we think the remainder of the conduct did not rise to
12 the level of flagrant abuse. Nevertheless, we cannot comprehend
13 why the government would put a strong case in jeopardy by
14 resorting to such tactics. It should not have done so. See
15 generally United States v. Modica, 663 F.2d 1173 (2d Cir. 1981)
16 (per curiam), cert. denied, 456 U.S. 989 (1982).

17 For the foregoing reasons, the judgment of the district
18 court is hereby AFFIRMED.

19 FOR THE COURT:
20 Catherine O'Hagan Wolfe, Clerk of the Court
21 By: 
22
23

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by: 
Dorothy Salter
Deputy Clerk
